IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-534

JAMES HERBERT PARRISH - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

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OPINION BELOW

The Opinion of the Supreme Court of Kentucky is reported at *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (1979).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because said application fails to meet the jurisdictional requirements of 28 U.S.C. § 1257(3).

The Petition for Writ of Certiorari is predicated upon the following contentions: I. Whether KRS 533.060 is unconstitutional as violative of the Eighth Amendment to the United States Constitution? II. Whether the trial court violated petitioner's rights under the Fifth Amendment to the United States Constitution pertaining to his silence at the scene of the crime? III. Whether petitioner's rights to due process of law were violated by comments made by the prosecutor in his summation to the jury? The respondent submits that none of the foregoing issues rise to constitutional proportions or are of such magnitude as to present to this Court sufficient grounds to exercise its discretionary jurisdiction pursuant to Supreme Court Rule 19.

I.

KRS 533.060(1) prohibits the grant of probation, shock probation or conditional discharge to any person convicted of a Class A, B or C felony where such offense involved the use of a weapon from which a shot or projectile may be discharged. Such is the case here where the petitioner used a firearm to shoot to death the decedent. The trial judge applied the foregoing statute to the facts of the instant case and denied probation consideration to the petitioner. Petitioner now maintains that KRS 533.060 is unconstitutional because it constitutes cruel and unusual punishment under the Eighth Amendment to be denied the right to probation summarily. The respondent disagrees.

The respondent submits that the Commonwealth's prohibition against probation in certain circumstances as set out in KRS 533.060 does not violate the Eighth Amendment. This Court has previously held than an actual criminal penalty of imprisonment *without benefit of parole* is constitutional. *Schick* v. *Reed,* 419 U. S. 256 (1974). Such a penalty is far more severe than the prohibition against probation. Accordingly, it would be nonsensical to find KRS 533.060 unconstitutional upon the grounds of cruel and unusual punishment. Therefore, the respondent submits that this contention does not present a sufficient ground as would authorize the discretionary jurisdiction to be exercised. *Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194 (1965); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969).

II.

As will be set out later in this Response, there was no violation of *Doyle* v. *Ohio,* 426 U. S. 610 (1976). The testimony adduced at trial established that the petitioner did not remain silent after the shooting but made several comments to civilians and officers of the law. These individuals came forward and testified at trial *as to what the petitioner did say.* It is clear beyond question from the record that the prosecutor was not attempting to elicit any adverse comment from any of the witnesses about the petitioner's silence. The focus of attention at trial was *what the petitioner had said.* Given these factual circumstances there has been no violation of the petitioner's right to remain

silent as guaranteed by the Fifth Amendment to the United States Constitution. Therefore, this contention does not reflect a substantial federal question and thus does not afford any basis for review by Writ of Certiorari. *Maryland and Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U. S. 367 (1970).

III.

Finally, the petitioner contends that the prosecution made such flagrant and prejudicial comments during his summation to the jury as to deny the petitioner due process of law. The respondent would direct the Court's attention to Argument III in this Response with respect to the facts pertaining to this issue. Perusal of those facts quickly reduces this contention to the specious. In fact, the respondent would respectfully submit that this contention is so lacking in merit that it should be dismissed by the Court as frivolous. *Swafford* v. *Templeton,* 185 U. S. 487 (1902); *Palmer Oil Co.* v. *Amerada Corp.,* 343 U. S. 390 (1952).

SUMMARY

In summary, the respondent submits that the petitioner's application for Petition for Writ of Certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3). The purpose of review by way of certiorari is not to give the defeated party another hearing. Certiorari jurisdiction is a creature of discretion and in the instant case the petitioner has clearly failed to establish that

this Court should exercise its discretion to grant review by certiorari. Supreme Court Rule 19.

The respondent will now endeavor to respond to the contentions raised by the petitioner as thougth those contentions were properly before the Court, even though respondent maintains that they are not.

COUNTERSTATEMENT OF THE CASE

During the late afternoon hours of August 31, 1976 Billy Johnson drove into Coburn's Service Station which is located on Highway 70 near the intersection with Highway 185 in Butler County, Kentucky. (Transcript of Evidence, hereinafter TE, Vol. I, 12). After purchasing a few dollars of gasoline, Johnson left the service station and drove west on Highway 70 toward Morgantown, Kentucky. (TE, Vol. I, 15). At about the same time, the petitioner, James Herbert Parrish, who lives directly across from Coburn's Service Station, had just driven his pick-up truck into his driveway when he observed Johnson leaving the service station. (TE, Vol. II, 31-32; Vol. I, 15, 24). Petitioner followed after Johnson and caught up with him a mile or so down the road. After petitioner blinked his lights at Johnson both men stopped their vehicles, Johnson's car stopping several feet in front of the petitioner's pick-up truck in the west bound lane. (TE, Vol. II, 33; Vol. I, 30).

Moments later David Whittinghill was driving east on Highway 70 and saw Johnson standing near the cab of the pick-up truck in which the petitioner was

sitting. (TE, Vol. I, 30). However, as Whittinghill reached his destination, Teddy Roman's Body Shop, a few hundred feet down the road, Teddy told him that he had just heard gunfire. (TE, Vol. I, 32). Teddy got into Whittinghill's car and they proceeded back down Highway 70 where they found Johnson lying in the road in the west bound highway with part of his body across the line in the east bound lane near the front of petitioner's pick-up truck. (TE, Vol. I, 33-34, 40). Petitioner was standing nearby. (Id., 35).

Petitioner had flagged down a passing motorist and told him to call the law, that he had just shot someone. (Id., 45-46). When Deputy Sheriff Phelps arrived petitioner told him that "I just shot him." (Id., 53). There was a bullet hole approximately one inch above Johnson's right eye and the little finger of his left hand was nearly shot off. (Id., 53). A .38 caliber pistol belonging to the petitioner was found in the cab of the pick-up truck. (Id., 54-55). None of the witnesses at the scene observed any marks or bruises on the petitioner nor any weapon near Johnson's body. Id., 54, 58, 63).

Vesper Coy, another passerby, pulled off the road, and talked with petitioner apparently shortly after the shooting. (Id., 102). When he asked petitioner why he shot Johnson, petitioner told him that Johnson was going to pull him out of his pick-up truck and beat the hell out of him. (Id., 103). Coy saw no weapon on or near Johnson and no bruises or marks on the petitioner. (Id., 103). Petitioner also told Dewey Shepherd at the scene that he had stopped Johnson

to talk about "family affairs" whereupon Johnson threatened to pull petitioner out of his pick-up truck and give him a "whipping." (Id., 115).

At trial, petitioner was to testify that a man named Willis had told him that Johnson had told him that he (Johnson) had been going with the petitioner's sister-in-law and the petitioner's wife. (TE, Vol. II, 50-52, 57-58). Willis took the stand and confirmed this conversation. (Id., 76-77). Petitioner further testified that three or four days after this conversation with Willis he was pulling into his driveway when he saw Johnson driving down Highway 70. (Id., 32). As previously noted, petitioner followed and then stopped Johnson in order to talk to him. Petitioner testified that Johnson got out of his car very quickly and came over to the cab of appellant's pick-up truck. (Id., 34). Petitioner allegedly repeated to Johnson what Willis had told him, whereupon Johnson allegedly threatened to drag him out of the truck and "whip the hell" out of him. (Id., 34). Petitioner then said he placed his hand on a .38 caliber pistol he had in the cab of the truck. He testified that Johnson started coming at him through the door of the vehicle *with a knife in his hand.* Petitioner admitted shooting Johnson but maintained that it was in self-defense. (Id., 34-35).

The Commonwealth established that although petitioner made numerous statements to passersby and the authorities when they arrived at the scene of the shooting, he made no mention to any of them of having been threatened by Johnson with a knife. In fact, the knife

allegedly used by Johnson did not turn up until the following day when the petitioner "found" the knife in the cab of his pick-up truck.

The October, 1976 term of the Butler County Grand Jury returned an indictment against the petitioner charging him with the offense of willful murder, as proscribed by KRS 507.020. (Transcript of Record, hereinafter TR, 4-5). At a jury trial held in the Butler Circiut Court on June 3-5, 1978, petitioner took the stand and testified in his own behalf. Petitioner admitted killing the deceased but testified that he did so in self-defense. (TE, Vol. II, 11-72). However, the jury returned a verdict finding petitioner guilty as charged and fixed his punishment at 20 years imprisonment. (TR, 95). Judgment was entered accordingly, and petitioner appealed his conviction to the Kentucky Supreme Court which affirmed his conviction in *Parrish* v. *Commonwealth,* Ky., 581 S. W. 2d 560 (rendered April 10, 1979). This Petition for Writ of Certiorari now results.

ARGUMENT

I.

KRS 533.060 Is Not Unconstitutional Under the Eighth Amendment to the United States Constitution.

Petitioner vigorously maintains that KRS 533.060(1), insofar as it prohibts the grant of probation by the trial court to a person convicted of an offense involving the use of certain kinds of weapons (i.e. pistol), is unconstitutional upon the grounds that

it violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution.[1] The respondent disagrees.

It would seem somewhat nonsensical to hold a prohibition against probation upon conviction for a particular offense to be unconstitutional under the Eighth Amendment where this Court as well as Kentucky courts have previously held an actual penalty[2] of *imprisonment without benefit of parole* to be constitutional: *Schick* v. *Reed,* 419 U. S. 256 (1974); *Green* v. *Commonwealth,* Ky., 556 S. W. 2d 684 (1977); *Edwards* v. *Commonwealth,* Ky., 500 S. W. 2d 396 (1973); *Martin* v. *Commonwealth,* Ky., 493 S. W. 2d 714 (1973). The position of the Commonwealth as to the penalty of life without benefit of parole upon conviction of the offense of rape has recently been upheld in the federal courts in *Moore* v. *Cowan,* 560 F. 2d 1298 (6th Cir., 1977), cert. denied 98 S. Ct. 1500. The abovementioned penalties are much more severe than the one complained of in this case, yet, as noted above, they have been found to be constitutional under the Eighth Amendment.

For example, pursuant to 26 U.S.C. § 7237(d) an individual convicted of certain federal narcotic offenses

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[1]KRS 533.060(1) reads as follows:

"When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge."

[2]Respondent, for purposes of argument only, is assuming that the prohibition against probation as applied in this case constitutes a *penalty.*

is denied probation and parole under federal law. This statutory prohibition has been upheld as constitutional in a number of instances. For example, see *United States* v. *Del Toro,* 426 F. 2d 181 (5th Cir. 1970). cert. denied 400 U. S. 829; *United States* v. *Williams,* 442 F. 2d 738 (D.C. Cir. 1970); *Sperling* v. *Willingham,* 353 F. 2d 6 (7th Cir., 1965), cert. denied 384 U. S. 962; *Halprin* v. *United States,* 295 F. 2d 458 (9th Cir., 1961). By analogizing the particular statutory provision in question in the instant case to the cases dealing with the aforementioned federal statute, this Court can safety arrive at the conclusion that KRS 533.060(1) does not constitute cruel and unusual punishment.

Although the constitutionality of this statutory provision was not specifically under attack upon Eighth Amendment grounds, recent Kentucky cases clearly uphold, albeit implicitly, the constitutionality of KRS 533.060. *Blondell* v. *Commonwealth,* Ky., 556 S. W. 2d 682 (1977); *Wethington* v. *Commonwealth,* Ky. App., 549 S. W. 2d 530 (1977). Furthermore, it is the legislature that makes the laws that declare what are criminal offenses and defines the processes by which these laws are enforced including the power to modify and provide for abatement or suspension of parole, probation, etc. See generally *Lovelace* v. *Commonwealth,* 285 Ky. 326, 147 S. W. 2d 1029 (1941).

It would also seem to follow that the legislature has the power to withhold an opportunity for a convicted felon to have the advantage of probation or parole for having committed a particular offense. Compare *Bel* v. *Chernoff,* 390 F. Supp. 1256 (D.Mass. 1975).

In summary, it is the position of the respondent that KRS 533.060(1) is not repugnant to the Eighth Amendment of the United States Constitution upon the ground that it allegedly constitutes cruel and unusual punishment. Moreover, respondent asserts that the singling out by the legislature of those persons who commit felony offenses involving the use of a weapon from which a shot or projectile may be discharged, capable of producing death or other serious physical injury, is a sufficient basis to deny probation as well as shock probation and conditional discharge. Accordignly, the trial court did not err by refusing to grant probation to the appellant. The petition should be denied.

II.

The Trial Court Did Not Commit Constitutional Error by Allowing Into Evidence Testimony Pertaining to Comments Made by the Petitioner at the Scene of the Crime.

Petitioner urges that the trial court denied him due process of law and thus committed reversible error when it admitted into evidence, over his objection, testimony which he maintains relates to his silence while he was allegedly in police custody. *Doyle* v. *Ohio,* 426 U. S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The respondent submits that there was no *Doyle* violation of constitutional rights.

It is the position of the respondent that the Commonwealth did not introduce any evidence with respect to the fact that petitioner had exercised his Fifth

Amendment right to remain silent immediately following the shooting. In fact, the testimony in issue here, that of Deputy Sheriff Phelps, had nothing at all to do with what the petitioner *did not say,* but rather, focused upon what the petitioner *did say.*

The evidence adduced at trial, from both civilian witnesses and officers of the law, established that the petitioner did not remain silent after the shooting, or for some time thereafter. (TE, Vol. I, 35, 45-46, 53-56, 61, 112, 114-115). Petitioner, on the other hand, testified that he did not remember what he might have said afterwards. (TE Vol. II, 65).

Phelps, who was apparently the first officer to arrive at the scene of the shooting and *did not know what had happened or who was involved* asked the petitioner, who was standing nearby, "What happened?" and petitioner hold him, "I just shot him." (TE, Vol. I, 53). A few minutes later Phelps looked in the cab of petitioner's pick-up truck and asked him if the gun lying there in the seat of the cab was the one with which he had shot Johnson. Petitioner responded in the affirmative. (TE, Vol. I, 55). This line of questioning by the prosecutor of Phelps finally culminated some pages later when Phelps was asked

> "Q. Did you learn anything more about what had happened up there at that time?
>
> A. No sir, because, like I say, I didn't talk to Mr. Parrish any more about it because the Detective came, I think Wallace and Joe Webb was there, and he made the statement that he did it and his reasons, that he would rather not tell." (TE, Vol. I, 56).

From reading the above quoted testimony within context of the record, and more particularly the entire testimony of Deputy Sheriff Phelps, it is clear that the prosecutor was not attempting to elicit any adverse comment from Phelps about the petitioner's silence. Again, the focus of attention was what the petitioner *had said and the statements he had made, not his silence.* Compare *United States* v. *Ivey,* 546 F. 2d 139 (5th Cir., 1977), cert. denied, sub nom. *Taglione* v. *United States,* 431 U. S. 943 (1976).

Interestingly enough, the first reference as to the petitioner's constitutional right to remain silent was brought up not by the prosecutor, but by counsel for the petitioner upon cross-examination of Phelps. (TE, Vol. I, 61). The jury's attention was again focused upon the petitioner's right to remain silent later in the trial during the redirect examination of the petitioner *by his counsel.* (TE, Vol. II, 67). Thus, the only testimony in this record which could conceivably be construed as a *Doyle* violation was elicited not by the prosecution but by the petitioner.

To reiterate, no action was taken on the part of the prosecution or the trial court which resulted in testimony being introduced by the Commonwealth that would require reversal of this conviction under *Doyle* v. *Ohio, supra.* Parrish had not remained silent after the shooting. Therefore, the testimony presented by the prosecution with reference to the statements he made at the scene of the crime were perfectly admissible. Compare *Mishler* v. *Commonwealth,* Ky., 556 S. W. 2d 676, 681 (1977). After all, if the accused

makes, as here, an admissible statement, the recounting witness may testify to what the accused said up until the accused refused to make any more statements. The witness, as here, may conclude his account in a natural fashion by indicating there is nothing more to say because the accused chose to stop. *United States* v. *Williams,* 556 F. 2d 65, 67 (D.C. 1977), cert. denied 97 S. Ct. 2936. Otherwise, the jury may erroneously infer that it was the police who cut the interview (or conversation) short before the accused had a full opportunity to give his account. No constitutional error occurred under the facts of this case.

III.

The Petitioner's Rights to Due Process of Law Were Not Violated by the Comments Made by the Prosecutor in His Summation to the Jury.

During the course of a ten page summation to the jury by the prosecutor the petitioner made two objections, which closely followed one another, to certain allegedly objectionable comments. (TE, Vol. III, 36-37). His objections were overruled and petitioner now urges reversible error in this regard. The respondent disagrees.

Petitioner's first objection was to the prosecutor's comments pertaining to the petitioner's nephew who also worked at the same meat packing company as did the deceased. The prosecutor commented that *this nephew also had a boning knife* such as that which the petitioner presented in evidence as the one allegedly

used by the deceased during an attack upon the petitioner. The petitioner objected to this comment upon the ground that there was no evidence to support it. (TE, Vol. III, 36). The trial court ruled that, although there was no direct evidence as to that specific point, the prosecutor had a right to draw his own conclusions from the record and overruled the objection. The respondent respectfully submits that under the facts of this case no due process violations occurred.

The owner of the meat packing plant, Marshall Klineline, testified that the petitioner's nephew also worked there as had the deceased. (TE, Vol. II, 72-73). Klineline also testified that the boning knife introduced into evidence was of the same type as the boning knives used at his plant by his employees and that those knives, in effect, become the property of his employees. (TE, Vol. II, 70, 72).

Here, it is obvious that the Commonwealth was merely drawing a reasonable inference from Klineline's testimony that the petitioner's nephew would also have such a boning knife as that introduced into evidence. This inference from the evidence was proper even though there was no direct testimony that the petitioner's nephew did *in fact* have such a knife. Under these circumstances, no error occurred since the prosecutor may make legitimate deductions and reasonable inferences from the evidence deduced at trial. *Hunt* v. *Commonwealth,* Ky., 466 S. W. 2d 957 (1971).

Secondly, petitioner complains of the comments made by the prosecutor which immediately followed

appellant's initial objection. When the trial court overruled the first objection, the prosecutor commented,

> "It is hurting, why they are objecting. It is hurting, what I am talling (sic) you." (TE, Vol. II, 37).

When the petitioner in turn objected to the above comment, the prosecutor pointed out that he had not objected while defense counsel was summing up. This comment by the prosecutor was, in turn, followed by yet another objection of defense counsel. The respondent takes the position that these latter comments made by the prosecutor do not constitute reversible error.

The respondent would admit that the latter two comments made by the prosecutor *could have best been left unsaid.* However, the question to be resolved here is whether those comments so inflamed the jury as to render them unable, as a matter of due process, to impartially consider the issue of petitioner's innocence or guilt. The respondent urges that those comments taken within the context of the entire trial did not take undue advantage of the petitioner. Cf. *Webb* v. *Commonwealth,* Ky., 451 S. W. 2d 397 (1970).

Secondly, those comments certainly did not add any "fuel to the fire" as the case here was already before the jury on the evidence and the allegedly objectionable comments may at best be considered as frivolous remarks. Compare *Timmons* v. *Commonwealth,* Ky., 555 S. W. 2d 234 (1977). Nor did the petitioner request the trial court to admonish the jury with respect to those comments. Under these circumstances, no denial of due process occurred.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that the petitioner has failed to present a substantial federal question which would authorize much less warrant the exercise of this Court's discretion under Rule 19. Therefore, respondent urges that the petition be dismissed.

Respectfully submitted,

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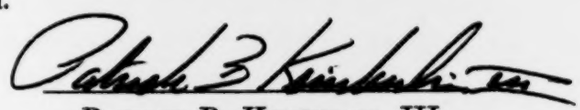
PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of October, 1979, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing three copies in the United States Mail, first class postage prepaid, and addressed to Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Ky. 40202, Counsel for Petitioner, and Hon. William E. Rueff, Warren and Ohio Streets, Morgantown, Ky. 42261, Of Counsel.



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